United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2294

To be argued by
ARNOLD B. ELKIND

United States Court of Appeals

FOR THE SECOND CIRCUIT

TERESA M. BURNS, as Administratrix of the Goods, Chattels and Credits of GEORGE VINCENT BURNS,

Plaintiff-Appellant,

—against—

PENN CENTRAL COMPANY, n/k/a PENN CENTRAL TRANSPORTATION COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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ISSUES PRESENTED FOR REVIEW

I. Whether the Trial Judge correctly denied the widow of a railroad worker, who was shot and killed in the course of his employment, the right to jury determination of her claim against his employer?

II. Whether, as a matter of law, the bottom step of the open doorway of a car of a passenger train moving through Harlem was a reasonably safe place to work?

III. Whether knowledge of stonings of trains in Harlem is some evidence of foreseeability of similar types of third party torts in that area?

IV. Whether the Court properly determined that the plaintiff's decedent was free from contributory negligence as a matter of law?

V. Whether Section 83 of the Railroad Law of the State of New York is a statutory recognition that it is hazardous for one to be present on the steps or platform of the vestibule of a moving passenger train, and whether such statute imposed a duty on the defendant to instruct its employees to confine passengers to the interior of moving passenger trains?

STATEMENT OF PROCEEDINGS

This action, brought under the Federal Employers' Liability Act (45 U.S.C. §51 et seq.) to recover damages for the wrongful death of a Trainman, was tried before Judge Whitman Knapp and a jury on September 10, 11, 12, 13 and 16, 1974. The Trial Judge held, despite objection by both sides, that the decedent was free from contributory negligence as a matter of law (170A, 171A, 172A, 173A)* but submitted the remaining issues of the railroad's negligence and causation to the jury. The jury was unable to reach a unanimous verdict and the Judge thereafter granted the defendant's motion for a directed verdict and dismissed the complaint. The appeal is from the judgment entered on September 23, 1974 dismissing the complaint.

STATEMENT OF FACTS

The facts were not in dispute. The Defendant-Appellee operated a passenger railroad service which entered the Borough of Manhattan via a bridge over the Harlem River (138th Street Bridge) and then proceeded on a trestle over Park Avenue through Harlem until it entered a tunnel in the vicinity of 102nd Street (241A-243A).

There is a passenger station at 125th Street which, in 1969, had a low-level platform. A low-level platform is one that is below the level of the floor of passenger cars.

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* numbers in parentheses refer to pages in the Joint Appendix.

Plaintiff's Exhibit #3 (245A) shows a passenger car with the vestibule door and trapdoor in the open position as it would have to have been in order for passengers to leave or board the train at 125th Street in 1969.

Rule 4157-A of the defendant-appellee's "Rules for Conducting Transportation", which was in effect on or before March 15, 1969, provided in part as follows:

> "Side and trapdoors on passenger cars in service...must be kept closed except that on trains making frequent stops side and trapdoors on platform side may be left open between stations. When practicable, they must be closed when approaching and passing through tunnels, over bridges and trestles.
>
> In the open or closed position side and trapdoors must be latched securely.
>
> Employees in the discharge of their duties may open side and trapdoors, and at stations the doors may be opened only on platform side.
>
> Employees must be on the alert at all times, particularly at stations, to take necessary action in event passengers attempt to board or leave moving trains."

The procedure for preparing a passenger car for the entrance and departure of passengers so that it would be in the position shown on Plaintiff's Exhibit #3 (245A) involves the turning and swinging of the exterior door and the release of a trap on the floor of the vestibule, which comes up to reveal the fixed staircase leading to the "low level" (see markings on 245A). The time necessary for thus preparing the doorway is less than 10 seconds (110A).

The defendant-appellee's records reflect its knowledge of a substantial number of stonings of passenger cars (Plaintiff's Requests to Admit, 9a; Defendant's Admissions, 13a). The Court permitted in evidence the defendant-appellee's knowledge, according to its records, of stonings during a 10 month period prior to March 15, 1969 in the geographical area which it found to be a distinguishable *locus in quo*. Thus admitted into evidence (95A-96A) were records of stonings on the following dates and at the following places:

May 17, 1968	125th Street
June 10, 1968	129th Street
June 11, 1968	127th Street
June 19, 1968	106th Street
September 2, 1968	130th Street
September 19, 1968	103rd Street
October 14, 1968	102nd Street
January 20, 1969	103rd Street

With respect to southbound trains the railroad's interpretation of its Rule 4157-A is that the passenger train crews can exercise their discretion and judgment in deciding at what point, after clearing the 138th Street Bridge over the Harlem River, the Trainmen will open the doors and trapdoors for the departure and boarding of passengers at the 125th Street Station (212A). It has long been the custom and practice of passenger train service employees to perform this function when the southbound train clears the 138th Street Bridge, and for the Trainmen to take

a position on the bottom step in the open doorway in order to carry out the instructions in the last paragraph of Rule 4157-A (210A).

Four train service employees testified at the trial. None of these employees had ever heard or been informed of the 8 stonings along the trestle in Harlem which the Court admitted into evidence.

Lawrence Forbes was the Suburban Trainmaster in charge of commuter service. Forbes, however, did know of the stonings (202A-205A). His method of communication to operating Trainmen was via Bulletin Boards (213A-214A) or through the employees' Timetable which was published semi-annually (214A). It was the Trainmaster's judgment that he had no duty to communicate his knowledge of the stonings to the train service employees (214A). In his capacity as Suburban Trainmaster Forbes had the authority to recommend revisions in the operating rules (195A), such as 4157-A; and although train stonings had been going on for ten years (216A) in the Harlem area, Forbes did not even appear before the rules committee of the railroad to discuss the advisability of changing the rules (197A).

Charles Ruhs, an Assistant Conductor, testified that he would have thought it to be hazardous to open the door of the passenger car and assume a position on the lower step before the train came into 125th Street if he had been

warned of the prior stonings in that area (58A).

Peter McGeoch was the Conductor in charge of Train 8748 on March 15, 1969. Train 8748 was a 2-car multiple unit train made up of cars 1147 and 1166 (244A) that left Croton, New York, at 6:10 P.M. bound for New York City, with a scheduled stop at 125th Street. Pursuant to Rule 400N-1, McGeoch was in charge of the train and responsible for its safety. McGeoch was not given any information with respect to the stonings in the Harlem area (97A-98A).

George V. Burns, the decedent, was 49 years of age on March 15, 1969. He had been working for the defendant-appellee since 1945. While qualified and experienced in passenger service, he had been spending about two-thirds of his time in freight service during the year preceding his death. He lived in Putnam County, was a married man and the father of 5 girls, the oldest of whom was born in 1957 and was just under 12 years of age at the time of his death. Four other daughters were born to Mr. and Mrs. Burns in 1958, 1959, 1960 and 1964. A sixth daughter was born posthumously on October 13, 1969.

Mr. Burns received a phone call to work as a Brakeman on Train 8748 on March 15, 1969, thereby filling a position that had usually been occupied by Trainman Ruhs (39A). The train crew was made up of Conductor McGeoch, Engineman

Brown, and the decedent. The head car of the two-car train was car No. 1147, which appears in Plaintiff's Exhibits #2 and #3 (244A, 245A). On March 15, 1969, shortly before 7:00 P.M. Mr. Burns, in accordance with the long time custom and practice of Trainmen doing his kind of work, walked to the rear of car No. 1147 after the train crossed over the Harlem River Bridge at 138th Street, and on to the rear vestibule, opened and latched the side and then the trapdoor, and descended to the bottom step, which he reached when the train was about 3 blocks from the northern end of the 125th Street Station (46A, 47A). He stood on the bottom step as the train approached the station, in a position to prevent passengers from leaving a moving train. The train was travelling slowly at a speed of 3 miles per hour (122A) at that point. When the train was in the vicinity of 128th-129th Streets, or about 100 yards from the northern end of the station, Mr. Burns was shot and instantly killed by a bullet fired from a rifle by a neighborhood youth from the roof of a tenement building located west of the trestle.*

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* The Court is asked to take judicial notice of the fact that the Newark and Detroit riots of 1967 led to the appointment that year by President Johnson of the Commission on Civil Disorders (Kerner Commission), which made its report in 1968, and that Harlem is a predominantly black Ghetto of New York. Further, in 1968 a Commission was appointed to study The Causes and Prevention of Violence (Eisenhower Commission), which made its report in 1969.

The plaintiff-appellant offered to show, but the Court rejected, evidence that on March 15, 1969, and for many years prior thereto, Section 83 of the Railroad Law of the State of New York provided in part as follows:

> "No railroad corporation shall be liable for any injury to any passenger while on the platform of a car, * * * in violation of the printed regulations of the corporation, posted up at the time in a conspicuous place inside of the passenger cars, then in the train, if there shall be at the time sufficient room for the proper accommodation of the passengers inside such passenger cars."

(It was conceded though not shown that the appropriate notice in conformity with Section 83 of the Railroad Law had been posted in Car No. 1147 and that there were adequate seats for all passengers therein).

STATUTES INVOLVED

45 U.S.C. §51 makes the railroad liable in damages for "an injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of the carrier".

45 U.S.C. §52 authorized the action for wrongful death for the benefit of the surviving widow and children of the employee.

45 U.S.C. §53 makes the doctrine of comparative negligence applicable to the claim.

45 U.S.C. §54 eliminates assumption of risk as a defense where there is evidence of negligence by the railroad.

Section 83 of the Railroad Law of the State of New York establishes a statutory recognition in New York State that the vestibule of a railroad passenger car is a more dangerous place to be than the inside of a railroad car.

ARGUMENT

The Federal Employers' Liability Act is social legislation designed for the benefit of those who engage in an essential but hazardous industry. While the Act includes the requirement of showing negligence, the judicial veneer applied to the Act by the Supreme Court requires that the jury, as opposed to the trial judge, make a determination as to whether any questionable conduct by the railroad is sufficiently substandard to amount to negligence and, if so, whether that negligence was a cause "in whole or in part" of the damage sustained by the employee.

In the case below the railroad could have at least given notice to the Conductor, who was in charge of the safety of the train, of the fact that there had been stonings of trains in the Harlem area. It was unnecessary risk-taking for the decedent to have been in an exposed and vulnerable position in the open doorway of a passenger car moving

through the Harlem area before the train pulled into the 125th Street Station. Whether or not it was negligent for the railroad to have authorized this unnecessary vulnerability to the hazard of missiles, and whether, similarly, the decedent was guilty of any negligence, were issues requiring jury determination.

POINT I

THE ISSUES OF NEGLIGENCE AND CAUSATION REQUIRED JURY DETERMINATION

Trainman Burns, in accordance with the established practice of men doing his type of work, had anticipated his train's arrival at the 125th Street Station and had prematurely opened the side and trapdoor to his passenger car, thereby making it necessary for him to stand in the doorway to carry out his duties. Whether or not Burns knew that missiles were being thrown at the train, there would be a question of fact with regard to the negligence of Burns in thus placing himself unnecessarily in a position of increased danger.

A person cannot be prudent as a matter of law if that person unnecessarily and unreasonably leaves a position of relative security for a position of peril. *See*, e.g. Restatement of the Law (Second) Torts, §466, Comment c; Prosser, Law of Torts (4th ed., 1971) §65. Hence, if the mechanism of Mr. Burns' injury had been the sudden application

of an emergency brake throwing him from the step in the open doorway of the passenger car, there would be a question for jury determination as to whether or not Mr. Burns was in the exercise of appropriate care in being on the step unnecessarily, and the question of his fault would be for the jury.* Prosser, *supra*.

Plaintiff-appellant contends that there was a question for the jury, based on the evidence in this case, as to whether or not the defendant-appellee had exercised reasonable care to furnish Trainman Burns with a safe place to work. It can be argued with reason that at the time the decedent was permitted to stand in the door of the car, the decedent could have been, and, in the exercise of prudence should have been, within the relative sanctuary of the interior of either the vestibule with door closed or in the car itself, in which event he would not have been exposed to injury or death. There are foreseeable threats to personal safety which follow from being in the vestibule of a passenger train with the trap up and the door open. Amongst these foreseeable threats to personal safety common to railroading and to be anticipated as a matter of law, are death as the result of being thrown from the car to the trestle below by a lurch (*Goneau v. Minneapolis, St. P. & S.S.M. R. Co.*, 154 Minn. 1, 191 N.W.

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* Appellant will contend in Point III infra that it was error for the Court to have taken away from the jury the question of whether or not Trainman Burns was guilty of any negligence.

279 (1922); *Bohm v. Chi. M. & St. P. R. Co.*, 161 Minn. 74, 200 N.W. 804 (1924)),* and the threat of serious personal injury or death as a consequence of being thrown against a steel bulkhead by a sudden stop or unexpected movement of the train. (*Herdman v. Pennsylvania Railroad Company*, 352 U.S. 518 (1957); *N.Y., N.H. & H.R. Co. v. Henagan*, 364 U.S. 441 (1960); and see Railroad Law of State of New York §83).

We assume for the purpose of analysis only that the specific mechanism which killed Mr. Burns while he was in an unnecessarily vulnerable position was one which could not be reasonably "foreseen", and grant that the railroad could not be expected to anticipate that a youth on a rooftop would fire a rifle at the decedent.

The railroad could, however, reasonably have anticipated from the fact that there had been 8 prior stonings in the area in the preceding period of 10 months that Mr. Burns would be struck in the head by a stone, causing him to lose consciousness and fall to the tracks and his death.

Plaintiff-appellant urges two positions. Primarily she argues that the Court below was correct in admitting evidence of the prior stonings; that this evidence was sufficient to create a question of fact as to whether or not other types of missiles might be directed to a train in Harlem; and that "foreseeability" does not include the

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* See Railroad's Rule 417-A supra requiring doors to be closed if practicable when train passes over a trestle.

precise mechanism of damage. *Lillie v. Thompson*, 332 U.S. 459 (1947); *Ferguson v. Moore McCormack Lines*, 352 U.S. 521 (1956); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 (1957), cf. *Hartel v. Long Island Rail Road Company*, 356 F.Supp. 1192, aff'd 476 F.2d 462 (2nd Cir., 1973), cert. denied with dissenting opinion 94 S.Ct. 273, 38 L.Ed. 224.

Plaintiff-appellant's fallback position is that assuming there had been no prior stonings in the Harlem area but merely negligence "in a vacuum"* which led to injury, there would still be triable issues for the jury. *Gallick v. B. & O. R. Co.*, 372 U.S. 108, 121 (1963); *Rogers v. Missouri Pac. R. Co.*, *supra*; Green, *Foreseeability in Negligence Law*, 61 Columbia L. Rev. 1400 (1961); *Petition of Kinsman Transit Company et al*, 338 F.2d 708, 724, 725 (1964); Prosser, *Law of Torts*, (4th ed., 1971) at 286; *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir., 1933), cf. Restatement of the Law (Second) Torts §442(b).

Lillie v. Thompson, *supra*, is the landmark case in which the Supreme Court imposed a duty on railroads to guard against third party assaults. The "Harlem" of the *Lillie* case was a railroad yard which the employer knew was "frequented by dangerous characters". The negligence was in authorizing a female telegrapher to perform her duties in

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* i.e., any course of conduct involving exposure to unnecessary peril of bodily harm or death --

an isolated office in the yard, which included the admission from time to time of authorized personnel, without providing for a means of identification. Late one night Miss Lillie answered a knock at the door; a stranger entered and beat her with a piece of iron. There had been no previous criminal attacks on any telegraphic operator. The evidence was that the employer knew that the yards were frequented by dangerous characters. The Supreme Court said (332 U.S. 462):

> "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it."

There are two apposite propositions from the *Lillie* case, one expressed and one implied. The expressed proposition is that the intervention of criminal misconduct is not relevant to the legal problem of whether or not the railroad's negligence in failing to furnish a reasonably safe place to work is a cause "in whole or in part" of an employee's damages. *Rogers v. Missouri Pac. R. Co., supra.*

The implied proposition is that the Court will impose a duty to prevent even dimly perceived foreseeable risks of bodily harm to railroad employees where the cost of preventive action is cheap or minimal.

In the case at bar warnings could have been given to passenger train crews in the Timetables or Bulletin Boards without any expense or impairment of operating efficiency. The vestibule of the train could have been prepared for the passengers in less than 10 seconds as the train came to a halt in the 125th Street Station. Even a slight risk may be unreasonable where it can be avoided with relatively slight effort, cost and inconvenience. *Pease v. Sinclair Refining Co.*, 104 F.2d 183 (2nd Cir. 1939); *Yoffee v. Pennsylvania Power & Light Co.*, 385 Pa. 520, 123 A.2d 636; *Stephani v. City of Manitowac*, 89 Wis. 467, 62 N.W. 176. Professor Prosser points out (Law of Torts 4th ed. at 149, citing the Restatement) that the expedience of the course pursued is one of the factors which must be weighed in determining negligence. In the *Yoffee* case, *supra*, the preventative measure was some electrical bulbs which would have warned low-flying aircraft of the presence of a bridge, and in the *Pease* case in this Circuit, *supra*, the preventative measure would have been to accurately identify the contents of a bottle of water rather than mislabel it as "kerosene".

Since the intervention of criminal misconduct is not relevant in FELA litigation under the *Lillie* case, *supra*, Judge Clark's opinion in *Pease v. Sinclair Refining Co.*, *supra*, should have significance to this Court with regard to

the problem of foreseeability. Pease was a high school teacher who obtained educational materials from Sinclair, one of which was a bottle marked "kerosene". Unbeknownst to Pease, Sinclair had substituted water in the jar labeled "kerosene". In a classroom demonstration Pease, without smelling or otherwise testing the jar marked "kerosene", poured its contents on to some sodium metal, producing an explosion and personal injury. The *Pease* case therefore, as Judge Clark wrote (185):

> "... is one of those cases where not unusual human conduct produces results so unexpected and tragic as to startle and amaze. Yet legal precedents and human experience combine to show that bizarre accidents are far from unlikely, and recovery cannot be denied because of the uniqueness of the happenings."

The Court said (186):

> "If we feel the defendant at least somewhat culpable in failing to take the simple step of a warning, then we see no reason to take the case from the jury when the consequences are serious, and, because serious, are unexpected. * * * Here defendant had launched upon a course of conduct, had set the stage, in such a way that it should go the little distance further to give notice of what it had done. * * * So, also, proximate cause may be found for the accident from the defendant's neglect."

The Court cited a substantial number of cases involving situations where some defect or default of the defendant led to rather surprising consequences but in which liability was supported (Id at 187).

In this non-FELA case we find this Court concluding its opinion in the *Pease* case with these words (187):

> "Hence we conclude that the conduct of both parties should go before the jury. The defendant asserts that such a course, with the corporate defendant here, means that a verdict for the plaintiff is certain to follow. Even if that is justifiable prophecy, it still does not mean that the jury is wrong or that a general community standard as to what should be the risks of the business undertaken by the defendant must be disregarded. 'As the experience of one man usually differs from that of another, our law wisely says that what is "reasonable" is to be determined by the jury--that is, it is to be the resultant of the, to a certain extent varying, opinions of twelve different persons.' Palles, C.B., in Sullivan v. Creed [1904]. 2 Ir.R. 317, 330. And there we may well leave the decision."

In 1973 this Court was presented with an appeal from a directed verdict for the railroad in a case where a Ticket Agent at Mineola was shot in the course of a holdup. *Hartel v. Long Island Rail Road Co., supra.* The case arose at a point in time after *Lillie, supra, Pease, supra, Gallick, supra, and Rogers, supra.*

In the *Rogers* case the Supreme Court had unmistakably opted for jury determination in cases in which employer negligence played any part, even the slightest, in bringing about a railroad worker's injury. In *Gallick, supra,* the Supreme Court reinstated a verdict for an employee where the

triggering mechanism of his injury was a bug-bite and where the negligence ascribed to the railroad-employer was in permitting the plaintiff to work in a place not far from an infested swamp. Although the jury made a special finding that the injury from that negligence was not foreseeable, 372 U.S. 111, the Supreme Court demonstrated the primacy of jury determinations under the FELA and reinstated the jury's verdict for the plaintiff. The Supreme Court, speaking through Mr. Justice White, criticized an instruction which called attention to the fact that there had been no prior occurrence, and on that basis chose to ignore the jury rejection of foreseeability. The Court wrote that this was "a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act". (372 U.S. 121).

It would seem obvious that the law would require the trier of the *Hartel* case to seek jury determination if there was any evidence presented of negligence in Hartel's working arrangements. The evidence profferred by Mrs. Hartel was the absence of a peephole between the ticket office and the waiting room so that Hartel was required to make himself vulnerable by going out into the waiting room without the opportunity to observe conditions that might affect his safety.

Mrs. Hartel unsuccessfully offered evidence of prior holdups at other stations which the trial court excluded, thereby adopting the very test of foreseeability which the Supreme Court had rejected in *Gallick*. The Court also rejected evidence of complaints by the Ticket Agent's union because they were couched in general terms rather than to the *locus in quo*. Without precedent, Judge Levet substituted the requirement of notice in lieu of general foreseeability and in effect said that the railroad was entitled to one shooting of an employee for free, as in dogbite cases. Prosser, Law of Torts (4th ed., 1971) 501. By a divided Court Judge Levet's directed verdict and dismissal of the complaint was affirmed. With three Judges of this Court dissenting, a rehearing *en banc* was denied on May 3, 1973.

The Supreme Court denied a petition for a writ of certiorari; two Justices dissented and followed the unusual procedure of joining in an opinion in which they opined to vacate the judgment below and remand the case for a new trial. 94 S.Ct. 273, 38 L.Ed.2d 224.

It is not difficult to distinguish the *Hartel* case from the evidence below in the instant case. In the case below there was an evidentiary focus on the *locus in quo* whereas the hazards in *Hartel* lacked relevant geographical definition. Hence, in the Court below it could be said with much greater

facility that there was reason to be concerned about the safety of the place where Mr. Burns was required to work. *Lillie v. Thompson, supra; Bailey v. Central Vermont Railway*, 319 U.S. 350, 353 (1943). It is hoped, however, that the Court will take this occasion to specifically overrule the *Hartel* case as one which imposes upon railroad employees the patently unfair burden of assuming the consequences of criminal violence in the necessary performance of their duties even though that risk could be mitigated by management at little or no expense.

Other Circuits continue to afford railroad workers the right to jury trials which, with so much controversy,* received the protection of the Supreme Court during the decades between 1939 and 1969. *Heater v. Chesapeake & Ohio Railway Co.*, 497 F.2d 1243 (7th Cir. 1974); *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974).

Even if there had been no stonings in the Harlem area there would nevertheless, under *Rogers, Gallick, Lavender v. Kurn*, 327 U.S. 645 (1946) and *Pease v. Sinclair Refining Co., supra*, have been questions for the jury as to whether or not negligence of the parties to the litigation played any role, even the slightest, in bringing about the damage which Mrs. Burns and her six daughters sustained when Trainman Burns was shot and killed.

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* See dissenting views of Mr. Justice Frankfurter to Rogers, 352 U.S. 524.

POINT II

THE EVIDENCE OF PRIOR STONINGS WAS ADMISSIBLE

Plaintiff-appellant requested that the defendant-appellee admit, for the purpose of this action and subject to pertinent objections as to admissibility, that the records of the defendant-appellee disclosed a number of train stoning incidents along the Park Avenue right-of-way between May 11, 1968 and February 25, 1969 (9a, 10a). The defendant-appellee admitted these stonings and volunteered additional information with respect to its records on stonings (13a-20a). After considerable colloquy with reference to what constituted the *locus in quo*, the Court ruled (36A, 83A) that "the site here is the Harlem area where the track is elevated" and, over the objections of defendant-appellee, the Court instructed the jury on 8 instances of stonings between 102nd Street and 132nd Street (95A, 96A). These stonings took place between May 17, 1968 and January 20, 1969.

Mr. Burns was killed by a bullet in the vicinity of 129th Street on March 15, 1969. The defendant-appellee's argument was that the evidence of stonings was not relevant to whether or not the defendant-appellee should have foreseen a shooting, insisting that only evidence of prior shootings in the vicinity of 129th Street would be relevant.

The jury's sole function in this case as submitted by the Trial Judge was to determine the reasonableness of the railroad's response, or lack of response, to the risks to which it should have perceived its train service employees were exposed. There was no way that the jury could possibly perform its function without an insight with respect to what the railroad knew regarding hazards from missiles in the Harlem area.* The stoning of a train is in the same category as the firing of a pellet from a gun. Both involve the risk of personal injury or death from a missile, depending upon the part of the anatomy that is struck. The result was within the scope of the railroad's negligence and if injury to its trainmen could be perceived from the throwing of stones the railroad had a clear obligation to protect them against that particular risk. As Professor Prosser wrote on the subject of foreseeable results of unforeseeable causes, Law of Torts (4th ed. 1971) at 286:

> "It is only a slight extension of his responsibility to hold him liable when the damage he has created is realized through external factors which could not be anticipated. An instinctive feeling of justice leads to the conclusion that the defendant is morally responsible in such a case, and that the loss should fall upon him rather than upon the innocent plaintiff."

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* The Trial Judge was of the view that everyone knew about the stonings and that it had been going on for years (231A). He apparently felt nobody should be required to act so as to mitigate the danger as a matter of law.

In FELA cases, where a foreseeability formula has been presented as an issue of fact for the jury, the Courts have permitted proofs of prior accidents. *See, Cahill v. New York, New Haven & Hartford R. Co.*, 224 F.2d 637 (2nd Cir., 1955) rev'd 350 U.S. 898, *remanded* 351 U.S. 183, 236 F.2d 410 (2nd Cir., 1956); *Plough v. Baltimore & O. R. Co.*, 164 F.2d 254 (2nd Cir., 1947), *cert. den.* 333 U.S. 861; *Baltimore & O.R. Co. v. Felgenhauer*, 168 F.2d 12, 17 (8th Cir., 1948); *Sears v. Southern Pacific Company*, 313 F.2d 498 (9th Cir., 1963).

As Mr. Justice Black stated in *Cahill v. New York, New Haven & Hartford R. Co.*, 351 U.S. 183, 189-190:

> "Cahill's case against the railroad was based in a large part on the failure to give him proper instructions before sending him to work in a dangerous place * * *. This made the railroad's knowledge of the danger of highway traffic at that location highly relevant in proving the railroad's negligence. What better proof could there be than the fact that the railroad knew there had been repeated accidents at the same location of the kind that brought about Cahill's injuries? No fair system of evidence would exclude such testimony when issues are raised like those involved here." See *District of Columbia v. Armes*, 107 U.S. 519, 525, 27 L.Ed. 618, 2 S.Ct. 840.

At the rehearing of *Cahill* before the Second Circuit Court of Appeals (236 F.2d 410) the defendant argued that

since the prior accidents were not shown to have been caused in a manner similar to the plaintiff's accident they were not relevant. The Court now held that this evidence was admitted for the sole purpose of supporting plaintiff's claim that:

> "the railroad knew or reasonably ought to have known that the particular location was an unsafe place to put him to work because of his inexperience and the claimed inadequacy of instructions given him as to his duties. For this limited purpose we think the list of prior accidents was admissible." Id. at 411.

In *Plough v. Baltimore & O. R. Co.*, 164 F.2d 254 (2nd Cir., 1947), the Court observed that if the dangerous character of a crossing or defendant's knowledge of that character are in issue, then evidence of prior accidents would be admissible. In *Baltimore & O.R. Co. v. Felgenhauer*, 168 F.2d 12 (8th Cir., 1948), which was an action for wrongful death resulting from a grade crossing collision in 1944, the Court held that:

> "Evidence of the number of persons killed or injured from 1933 to 1943 was admissible to show the dangerous character of the crossing."

In *Sears v. Southern Pacific Company*, 313 F.2d 498 (9th Cir., 1963) plaintiff, a brakeman, brought suit under the FELA for injuries sustained when he was severely injured

by a low hanging chute. He charged that the railroad failed to provide him with a safe place to work and required him to follow unsafe methods in performing his duties. The railroad defended charging plaintiff with contributory negligence, as he had known that the chute was sometimes left in a low-hanging position and he made no attempt to discover its position.

In order to show that the railroad had actual knowledge of a hazard by which plaintiff might be injured, plaintiff sought to introduce into evidence a letter from a union representative complaining of the lack of clearance between the car tops and the low hanging chute. The trial court excluded this evidence, and on this ground the Court of Appeals reversed. Citing 6 Wigmore, Evidence §1789 (3d ed. 1940), the Court held that this letter should have been admitted for the purpose of showing that the railroad had knowledge of the hazard from and after the date it received the letter. 313 F.2d at 501.

One might argue that the *Sears* case and the instant case are distinguishable: Whereas the union representative's letter was admissible in *Sears* because it alerted the railroad to the specific hazard by which plaintiff was there injured, the notice of hazard which the defendant-appellee in the case at bar had, and to which it admits, was of train stonings --

the decedent here was killed by a bullet. Such a distinction is, however, illusory. Reading the language of the *Sears* case together with that of *Gallick*, *supra*, regarding the foreseeability of a general danger, the conclusion is inescapable that the hazard posed by a stone and a bullet are of the same genre: both are missiles capable of causing devastating injuries and if either is properly aimed and propelled, each is capable of causing death. As Professor Prosser, cited by the U.S. Supreme Court in *Gallick*, has taught us, there is

> "... universal agreement that what is required to be foreseeable is only the 'general character' or 'general type' of the event or the harm, and not its 'precise' nature, details, or above all manner of occurrence. ... Some 'margin of leeway' has to be left for the unusual and the unexpected. ... [I]t can scarcely be doubted that a great deal of what the ordinary man would regard as freakish, bizarre, and unpredictable has crept within the bounds of liability by the simple device of permitting the jury to foresee at least its very broad, and vague general outlines.: Prosser, Law of Torts, 268-9 (4th ed., 1971)

What is eminently clear from the *Sears* case is that the letter of the union representative was admissible *not* because it gave notice of the specific hazard by which plaintiff was injured, for such pin-point accuracy regarding foreseeability

is irrelevant under both common law negligence and actions brought under the FELA. Indeed, the fact that the railroad may not have had a "specific 'reason' for anticipating a mishap or injury to [plaintiff is] a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act." *Gallick v. Baltimore & Ohio R. Co.*, *supra* at 121.

The teaching of the *Sears* case is instructive on yet another aspect of the admissibility of defendant-appellee's knowledge of prior train stonings. The railroad's knowledge of a hazardous condition is relevant under the comparative negligence provision of the FELA, which directs the finder of fact to reduce the plaintiff's damages "in proportion to the amount of negligence attributable to [him]." 45 U.S.C. §53. "Amount of negligence" relates to the quality as well as the quantity of a party's negligence, *Norfolk & Western Ry. v. Earnest*, 229 U.S. 114, 122 (1913), and the fact that the railroad had actual notice of a hazard (as seen by its own admissions) bears on the quality of its negligence. *Sears v. Southern Pacific Company*, *supra* at 501.

By the same token, the decedent Burns placed himself in a position of danger and his contributory negligence was pleaded as a defense. Thus, the Court in *Sears* held:

> "Under the rule of comparative negligence, the jury is entitled to consider all the circumstances which characterize the negligence of either party and which tend to fix the quantity and quality of that negligence in its relation to the sum total of the negligence of both parties. Even though the negligence of either party clearly appears, all circumstances of aggravation or of mitigation must be considered; ..." Id. at 502.

Therefore, the Court of Appeals continued, the trial court's exclusion of the union representative's letter was prejudicial because it bore also on the relative fault of each of the parties, Id. at 503. Since an essential element bearing on the quality of negligence of the respective parties is their knowledge of the risks involved in entering on the platform of the moving train before it arrived at the station, evidence of such knowledge is admissible. The thrust of the *Sears* analysis is precisely on point with the Burns litigation. If the basis of assessing damages under the FELA is comparative fault then the jury needs to know all the incidents and colorations of the railroad's culpability. Only in this way can the plaintiff's fault be measured against the totality of fault.

The usual objection for excluding this kind of evidence is not on the basis of relevancy but on the basis that it will prejudice the defendant in that collateral issues are exposed. The record of the trial in this case demonstrates

that whatever collateral issues were introduced were resolved favorably to the defendant-appellee by the Trial Court. The Court permitted the admissions of the defendant-appellee to be read to the jury, including its volunteered qualifications with respect to a number of admissions; the Court permitted the defendant-appellee to show the number of cars and passengers which went through the *locus in quo* without stonings (192A-196A). The evidence of the stonings was relevant on the issue of the defendant-appellee's knowledge; at a new trial it should also be relevant on the issues arising from the application of the doctrine of comparative negligence. The evidence was handled in such a way as to prevent any claim of prejudice to the defendant-appellee. If a new trial is ordered the Court's rulings with respect to the evidence on stonings should not be disturbed.

POINT III

THERE WAS EVIDENCE OF CONTRIBUTORY NEGLIGENCE BY MR. BURNS REQUIRING JURY DETERMINATION

The Court held that Trainman Burns was free from contributory negligence as a matter of law over the objection of the defendant-appellee (170A) and of the plaintiff-appellant (171A, 172A). The Court below erroneously assumed that the stipulated fact that Mr. Burns was following a long standing practice in standing on the step in the open doorway of a

moving train made him free from negligence as a matter of law. The test of negligence, however, is not custom and practice but what a reasonably prudent trainman would do under similar circumstances. *Clarke v. Chicago & N.W. Ry. Co.*, 63 F.Supp. 579 (Minn., 1945); *Terminal R. Ass'n of St. Louis v. Schorb*, 151 F.2d 361 (8th Cir., 1945). The plaintiff-appellant suggested below, and now urges on this appeal, that whether or not Mr. Burns was guilty of some negligence which led to his death was a question of fact for jury determination.

The Supreme Court of the United States has twice held, in *Herdman v. Pennsylvania R. Co.*, *supra* and in *New York, N.H. & H.R. Co. v. Henagan*, *supra*, that sudden and unavoidable stops are expectably normal risks of railroading. As a railroad employee with many years of service, Trainman Burns was charged with the knowledge of those risks, and when he opened the door and descended the steps while the train was still in motion and while it was a substantial distance from the station, Trainman Burns could be said to have engaged in unnecessary risk-taking to his person. The fact that the mechanism of injury turned out to be a bullet rather than a sudden stop does not make his freedom from contributory negligence a matter of law.

Louisville & N.R. Co. v. Davis, 75 F.2d 849 (6th Cir., 1935) was an appeal by the railroad from a judgment in a death action under the Federal Employers' Liability Act. Davis was killed as the consequence of directing a crane to lift an article from a pile of debris. One end of the pile of debris tipped, striking either the crane or the ground. The impact caused a brace to pull loose from the pile, the butt end of which dropped from a height of about 20 feet and struck the elevated end of a short brace lying upon a 12" x 12" block on which the decedent had one foot. The decedent was catapulted into the air and, upon falling, sustained the injuries which caused his death. The Court of Appeals held that the defendant was entitled to a directed verdict and reversed the judgment. The basis for reversal was that the decedent's conduct was the sole "proximate cause" of his injury. The fact that a "Rube Goldbergian" contrivance of physical forces brought about Davis' death gave the Court no pause, the Court writing:

> "That Davis could not reasonably have anticipated the precise manner in which the injury would occur is not controlling. It is sufficient that a generally dangerous situation was foreseeable. Johnson v. Kosmos Portland Cement Co., 64 F.2d 193, C.C.A. 6; Texas & Pacific R. Co. v. Carlin, C.C.A. 111 F. 777, 60 L.R.A. 462, affirmed 189 U.S. 354, 23 S.Ct. 585, 47 L.Ed. 849."

Section 83 of the Railroad Law of New York, if it was relevant, could have imposed upon decedent the affirmative duty not to permit his passengers on to the vestibule of the passenger car until the train was in the station.

The determination by the Court to find the decedent free from negligence as a matter of law operated, as a practical matter, to the prejudice of the plaintiff-appellant and was unquestionably a factor in contributing to jury disagreement. It imposed upon each juror the burden of finding the railroad liable for substantial damages for a senseless tragedy in which the claim of negligence against the railroad concededly played a relatively small role. The other choice for a juror was to have the decedent's widow and six children bear the total economic stress and loss of an event for the happening of which they were totally innocent. Because of this "all or nothing" choice the jury was not given the middle ground in which they could have fixed a portion of the responsibility for this tragedy upon the decedent as the Federal Employers' Liability Act contemplates for hard cases. 45 U.S.C. §53. *But see: Dixon v. Penn Central Company*, 481 F.2d 833 (6th Cir., 1973) in which a divided court required entry of a full judgment despite a jury determination of 50% contributory negligence.

The test as to whether or not there is a causal connection requiring jury determination and the instructions that are appropriate for determining whether or not there is that connection are the same -- i.e. whether the negligence is that of the employer or the employee. *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 824 (5th Cir., 1965). The Court wrote:

> "Thus the purpose [of 45 U.S.C. 53] is to accord damages where the injuries are caused wholly from the negligence of the railroad or where caused partly by its negligence and partly by acts of others. The others would, of course, include the injured worker too. The object was to free this new legislatively created right of the common law defenses and refinements and to supply in its stead a simplified structure in which damages would be borne by railroad and injured worker in proportion to their respective faults. Use of the terms 'in proportion to' and 'negligence attributable to' the injured worker inescapably calls for a comparison. Since it is clear that § 53 never contemplates a reduction in damages for negligent acts of the injured worker except to the extent such negligence brings about the injuries, it is obvious that for a system of comparative fault to work, the basis of comparison has to be the same.
>
> This, it seems to us, becomes perfectly evident when this matter is approached freed of the artificial terminology of 'proximate cause.' Although we there approved (312 F.2d 84, 91, note 5) the use of the instruction given (note 3, supra) and we observed also that the

> 'case does not call for any wholesale condemnation of the use of language of proximate causation' in FELA litigation, the fact remains that in the Rogers thesis which we follow, there is really no place for 'proximate cause' as such."

This Court should therefore rule that the decedent was not free from contributory negligence as a matter of law and that the determination of that issue is for the jury.

CONCLUSION

THE JUDGMENT DISMISSING THE COMPLAINT SHOULD BE VACATED AND THE CASE REMANDED TO THE U. S. DISTRICT COURT FOR A NEW TRIAL.

Respectfully submitted,

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Of Counsel

Service of _____ copies of this within

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R. B. Post

ATTORNEY FOR